No. 88-1650

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, *et al.*,
Petitioners,

v.

JEFFREY A. LEVITT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

This case arises out of the 1985 crisis in Maryland's savings and loan industry. Petitioners hold certificates of deposit in one of the failed institutions, Old Court Savings & Loan, Inc.*

The crisis arose from the rumored instability of Old Court and another state-chartered savings and loan institution.[1] The rumors triggered a general run on insti-

* Pursuant to Supreme Court Rule 28.1, Respondents state that Old Court Savings & Loan, Inc., which is currently in receivership, has no publicly traded parent, subsidiary or affiliate corporations.

[1] This account of the background to this case is taken from the opinion in *Brandenburg v. Seidel*, 859 F.2d 1179, 1181-82 (4th Cir. 1988), which the court below incorporated in its opinion. (Pet. App. A-4.)

tutions insured by the Maryland Savings-Share Insurance Corporation (MSSIC), a quasi-public institution. The panic became so severe that MSSIC itself was endangered and the state's savings and loan industry was threatened with collapse. The Governor declared a state of public crisis, limited withdrawals from MSSIC-insured institutions and called the General Assembly into special session.

The General Assembly enacted legislation to create a state-operated deposit insurance institution, the Maryland Deposit Insurance Fund (MDIF), to replace MSSIC. The legislation also established a framework for the administration of conservatorships and receiverships for insolvent savings and loans and gave MDIF the right to be named conservator or receiver of any failed institution insured by it. Finally, the legislation gave to the state court administering a MDIF conservatorship or receivership exclusive jurisdiction of all claims related to the liability of the insolvent institution or of MDIF. To implement this legislative scheme, Maryland's highest court appointed a single judge to adjudicate all claims arising out of the conservatorship and receivership proceedings for the failed savings and loan associations.

Pursuant to the legislation, the state court placed Old Court in receivership and named MDIF receiver. MDIF, as receiver, has brought state court actions against each of the respondents to recover sums that ultimately will be distributed through MDIF to reimburse Old Court depositors, including petitioners. *See Brandenburg*, 859 F.2d at 1192. The State of Maryland, through MDIF, has assured all depositors and certificate holders that it will repay the entire principal amount of their accounts. MDIF has announced, however, that Old Court depositors and certificate holders will not be compensated for interest accruing after November 8, 1985, and that interest for a prior period will be paid only at reduced rates. (Pet. App. A-5.)

Notwithstanding Maryland's efforts to have all claims for relief arising out of the savings and loan crisis adjudicated systematically in its courts, petitioners filed these actions in federal court complaining of MDIF's announced curtailment of interest on their Old Court deposits. They invoked two federal statutes, the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, and presented a number of pendent state law claims as well. Petitioners premised their claim under the '34 Act on the assertion that their certificates of deposit are "securities" within the meaning of the Act. Petitioners named as defendants the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Venable, Baetjer & Howard (counsel to MSSIC and Old Court), Old Court's accounting firm, and MDIF itself. (Pet. App. A-4.)[2]

The district court granted respondents' motions to dismiss the complaint. Applying this Court's determination in *Marine Bank v. Weaver*, 455 U.S. 551 (1982), that the Exchange Act does not apply to certificates of deposit in a federally regulated and insured bank, the district court held that Maryland's comprehensive regulatory and insurance system governing state-chartered savings and loans barred plaintiffs from characterizing their certificates as "securities" subject to that Act. (Pet. App. A-24.)

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[2] At an early stage of the action, MDIF was dismissed as a defendant by the district court on Eleventh Amendment grounds, and petitioners did not appeal this order. (Pet. App. A-4.) Nonetheless, because of MDIF's and the State of Maryland's substantial interest in preventing the disruption to the State's remedial efforts that this federal action would cause, and because petitioners have persisted with their claims against MSSIC, MDIF's predecessor, and Old Court, of which MDIF is receiver, the Attorney General, as counsel for MDIF, joined in the brief filed in the court of appeals in support of the district court's order dismissing the claims against respondents. The Attorney General has also joined in this brief in opposition.

The district court further held that it should abstain from deciding petitioners' RICO claims in deference to the state court proceedings. The district court noted that state courts presumptively have concurrent jurisdiction over federal claims (Pet. App. A-25), and that "the RICO claims in the present suit are essentially state fraud claims," which the state courts are fully qualified to handle (*id.* at A-28). In holding that abstention was necessary and appropriate under both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the district court observed that a substantial number of the defendants in the federal action were defendants in MDIF's pending state court actions, as receiver of Old Court, against the Old Court directors and the former MSSIC directors. Thus, the court reasoned that, if petitioners were allowed to proceed in the federal court, they would have "circumvented the receivership process." (Pet. App. A-27.) Further, any money awarded to petitioners "would potentially reduce the available funds" for satisfying a judgment in favor of depositors generally in the receivership actions. (*Id.*)

The court of appeals affirmed. The court agreed with the district court that *Marine Bank* foreclosed petitioners' Exchange Act claim because "there was a comprehensive regulatory and insurance system applicable to Old Court so that its certificates of deposit did not fall within the statutory definition." (Pet. App. A-7.) The court rejected petitioners' argument that, because, in hindsight, Maryland's regulatory system had failed, certificates of deposit in Maryland savings and loans should be treated differently from certificates of deposit in federally regulated institutions. The court noted that "[t]he nature of an instrument is to be determined at the time of issuance, not at some subsequent time." (Pet. App. A-8, *quoting West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987).) If the rule were otherwise, the court said, it

could lead to CD's not being a security when the deposit was made but turning into a security the next year because of a change in the state's regulatory or insurance program. (Pet. App. A-9.) The court concluded that "application of *Marine Bank* depends upon the comprehensiveness of the scheme of regulation, and by that test we think that the Maryland system qualified to render the certificates of deposit not 'securities.'" (*Id.* A-8.)

The court of appeals also agreed with the district court that petitioners could pursue their RICO claim in the state court so that, with the Securities Exchange Act claim out of the case, petitioners should be remitted to the comprehensive state court proceeding. The court had just decided *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), which also grew out of the Maryland savings and loan crisis, and had there decided both that state courts could entertain RICO claims and that Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations . . . provided a proper basis for the district court to abstain" in deference to the state court proceedings. (Pet. App. A-10.)

REASONS FOR DENYING THE WRIT

Neither of the questions presented by the petition is worthy of review by the Court. Both questions were decided correctly by the court of appeals applying standards established by decisions of this Court. On the question whether certificates of deposit are securities within the meaning of the 1934 Securities Exchange Act, this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982), controls, and there is complete unanimity among the circuits as to what that decision means. On the question whether state courts have concurrent jurisdiction over RICO claims, the decision below is in line with the overwhelming weight of authority applying to RICO jurisdiction the rigorous test for exclusive federal jurisdiction

laid down in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), and the one aberrant decision cited by petitioners does not present a sufficient conflict to warrant this Court's review. Indeed, the obvious need in this case to resolve all claims, state *and* federal, in a single forum, in order better to allocate assets and obtain recompense for all depositors, reinforces the conclusion that one should not lightly presume that Congress intended to divest state courts of authority over federal statutory claims.

I. WHETHER CERTIFICATES OF DEPOSIT IN MARYLAND SAVINGS AND LOANS ARE SECURITIES IS NOT A QUESTION WORTHY OF REVIEW.

In *Marine Bank v. Weaver*, this Court held that the definition of "security" in the Securities Exchange Act of 1934 does not extend to certificates of deposit in federally chartered banks. 455 U.S. at 558-59. The Court reasoned that the comprehensive scheme of regulation governing the issuing institutions ensured that those who make deposits evidenced by such certificates are not subject to the same type and level of risk as are purchasers of "securities" entitled to the protection of the Securities Exchange Act.

At issue in this case likewise are certificates of deposit. The court of appeals held that the fact that the certificates of deposit here were in institutions pervasively regulated by a state, rather than by a federal agency, did not change their basic character. The existence of "a comprehensive regulatory and insurance system applicable to Old Court" was determinative. (Pet. App. A-7.) The court pointed out that Maryland law vested supervisory authority over state-chartered savings and loan associations in two agencies and that deposits in the MSSIC member associations, of which Old Court was one, were insured by MSSIC. (*Id.*) These agencies administered statutes requiring associations to maintain reserve accounts, to comply with periodic reporting, inspection and audit requirements, and to conduct their promotional activities in accordance with

regulations promulgated by a state agency. (*Id.*) In holding that the existence of a comprehensive regulatory scheme is determinative under *Marine Bank*, and not whether that scheme is state, federal or even foreign, the court below followed consistent precedent in the lower courts applying *Marine Bank*. *See, e.g., Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1462 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1125 n.33 (5th Cir. 1985). *See also West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987).

Petitioners argue that the courts below should have engaged in an extended empirical analysis of the efficacy of the Maryland regulatory and insurance system as that system was actually administered. They say that a system that has ultimately proven unable to provide them with timely repayment of both principal and interest cannot, in retrospect, be said to be one that "virtually guarantees" the safety of their funds. (Pet. 10-13.) The court of appeals properly refused to engage in such *post hoc* review of the way Maryland administered its regulatory system. The court correctly concluded that the rule of *Marine Bank* does not depend on the existence of a perfect regulatory regime or require the federal courts to undertake an empirical evaluation of the administration of the regulatory program in order to ascertain whether a certificate of deposit is a security at any given moment.[3]

[3] In conducting such review, the federal courts would not always have the benefit of hindsight since, if a certificate of deposit was a security, it could form the basis of an Exchange Act claim in contexts wholly apart from the failure of the issuing institution. Under petitioners' theory, in order to decide the collateral issue whether a certificate of deposit was a security, district courts would routinely take evidence to evaluate the way in which a given state was administering its regulatory system. This intrusive oversight of state regulatory regimes not only offends principles of federalism but also could have disastrous practical consequences.

Here, the fact that the State of Maryland has acted to help ensure recovery of petitioners' deposits reinforces the special character of the certificates at issue. Although petitioners will not ultimately be able to recover all interest to which they believe themselves due and have been subject to delays in the return of their deposits, the State has acted expeditiously to reduce their losses and provided them with substantial protection that is far superior to the protection available to purchasers of "securities," as that term is used in the Exchange Act. Moreover, there is no reason to believe that, in enacting the Securities Exchange Act, Congress meant to give some depositors—holders of certificates of deposit—an advantage in available remedies over others—the holders of demand deposit accounts in the same institutions.

Petitioners make a veiled suggestion that the decision below creates a conflict in the circuits. There is no substance to this suggestion. The federal appellate decisions following *Marine Bank* have uniformly held that "the nature of an instrument is to be determined at the time of issuance, not at some subsequent time." *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir), *cert. denied*, 482 U.S. 906 (1987), *quoting Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1255 (9th Cir. 1976). Moreover, no court that has applied the *Marine Bank* analysis to certificates of deposit has undertaken the sort of after-the-fact assessment of the adequacy of a regulatory scheme that petitioners urge here.[4] Petitioners' reliance on *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985), is misplaced. That case did not involve certificates of deposit in a bank but rather so-called certificates of deposit sold by Merrill Lynch in a secondary market, created by Merrill Lynch, that was unregulated and uninsured by any state or federal banking laws. Under those circumstances—which are quite distinct from the instant case—the court held that the Merrill Lynch investment product was a security. *Id.* at 241-42.

A federal court determination that a state regulatory system was inadequate could create precisely the kind of run on the institutions that gave rise to this case.

[4] In *West* the plaintiffs challenged the effectiveness of Mexico's regulatory program. After noting that the nature of an instrument is to be determined at the time of its issuance, 807 F.2d at 826, the Ninth Circuit pretermitted detailed consideration of plaintiffs' contention that *post hoc* analysis is appropriate by holding that any inquiry into the effectiveness of a foreign government's actions is barred by the act of state doctrine. 807 F.2d at 828.

In short, the court of appeals correctly applied *Marine Bank* in deciding that the Old Court certificates of deposit were not securities within the scope of the federal securities laws, and its decision is consistent with those of its sister circuits.[5]

II. WHETHER STATE COURTS ARE DIVESTED OF JURISDICTION OVER RICO CLAIMS IS NOT A QUESTION WORTHY OF REVIEW.

The court below held that, in light of Maryland's comprehensive approach to the payment of depositors, this was an appropriate case for federal court abstention in deference to the coordinated state court proceedings. Petitioners do not question that obviously sound judgment. What they say is that such coordinated proceedings are impermissible here because the state courts are not competent to hear RICO claims. However, the court of ap-

[5] The precise question posed by the petition is unlikely to recur since few, if any, states still have in place state or private insurance programs as an alternative to federal deposit insurance. *See, e.g., Report of the Special Counsel on the Savings and Loan Crisis in the State of Maryland* 94-95 (Jan. 8, 1986) (identifying Massachusetts, North Carolina, Ohio and Pennsylvania as the only other states that have "passed legislation enabling the formation of state or private associations which would be an alternative and sometimes a supplement to FSLIC"). Since 1986, North Carolina and Ohio have effectively repealed their respective statutes permitting alternatives to federal insurance. *See* N.C. Gen. Stat. § 54B-17 (1987); Ohio Rev. Code Ann. § 1151.41 (1988).

peals' conclusion that state courts have jurisdiction to hear RICO claims is plainly correct and in accord with the clear weight of emerging federal and state authority.

Recognition of state court competence to hear RICO claims reflects the long-settled principle that "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (citations omitted). In *Gulf*, this Court began with the "presumption that state courts enjoy concurrent jurisdiction." *Id.* at 478 (citations omitted). This presumption can be rebutted only by (1) "an explicit statutory directive", (2) "unmistakable implication from legislative history", or (3) "a clear incompatibility between state-court jurisdiction and federal interests." *Id.* None of these three factors is present here.

First, as petitioners concede, there is no "explicit statutory directive" in RICO that jurisdiction is vested exclusively in the federal courts. The statute provides only that an injured person "may sue" in a district court. 18 U.S.C. § 1964(c). This Court has held that a statute that uses the word "may" in conferring jurisdiction of a federal claim on a federal court "does not state or even suggest that such jurisdiction shall be exclusive." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1961). *See Gulf Offshore*, 453 U.S. at 479 ("It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action"). In fact, inferring exclusive federal jurisdiction over RICO claims would be inconsistent with Congress' specific statutory mandate that the Act is to "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985). These purposes are

best served by increasing rather than decreasing the forums in which RICO claims may be pursued.[6]

Second, there is literally nothing in the legislative history, let alone an "unmistakable implication," to indicate that Congress intended to make jurisdiction over RICO exclusively federal. All of the courts that have addressed this issue have noted that the "legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction." *Brandenburg*, 859 F.2d at 1193. As RICO's principal draftsman has remarked, "no one even thought of the issue." *Id.* (citations omitted).[7] It is, of course, precisely where a statute and its legislative history are silent that the historical presumption of state court competence must be determinative.[8]

Third, there is no "clear incompatibility" between a RICO claim and state court jurisdiction. On the con-

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[6] Indeed, it is curious that petitioners, as parties claiming the benefits of RICO's remedial aims, seek to constrict the number of forums in which RICO claims can be brought. This short-sighted tactic—which will not serve the interests of RICO plaintiffs generally—is, of course, necessary for petitioners to overcome their principal hurdle, which is the court of appeals' wise decision to abstain from adjudicating the RICO claims in deference to Maryland's extensive and intricate efforts to resolve the State's savings and loan crisis in the State's own courts. This peculiar circumstance under which petitioners object to concurrent jurisdiction over RICO claims is one more reason why this case is not appropriate for this Court's review.

[7] *See also Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1283 (6th Cir. 1988); *Lou v. Belzberg*, 834 F.2d 730, 736 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988); *Cianci v. Superior Court*, 40 Cal. 3d 903, 710 P.2d 375, 379, 221 Cal. Rptr. 575 (1985).

[8] For this reason, petitioners' reliance on *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987) is misplaced. In *Malley-Duff*, this Court held that the Clayton Act's statute of limitations may be "borrowed" for RICO. That issue, involving the need to supply a limitations period, requires the Court actively to develop analogies from other statutes. That inquiry has little in common with the search for a congressional intention to oust state courts of their presumptive jurisdiction over federal claims.

trary, state courts are well-qualified to hear RICO claims, particularly since RICO includes a host of state law crimes among its predicate offenses. 18 U.S.C. § 1961 (1)(A). To the extent that RICO claims are based on violations of federal criminal law, the vast majority of cases rest on allegations of mail and wire fraud, which "involve garden variety state law fraud" with which state courts are fully familiar. *Belzberg*, 834 F.2d at 738. *See also Brandenburg*, 859 F.2d at 1195. Where a cause of action has both state and federal elements, it is no less appropriate under our federal system for a state court to determine the issues of federal law than it is for a federal court to address issues of state law.

Indeed, the special circumstances of this case highlight the importance of concurrent state court jurisdiction over federal claims. In *Brandenburg*, the Fourth Circuit explained in detail how permitting a few depositors, such as the petitioners, to maintain a federal action would interfere with Maryland's recovery scheme for the benefit of all depositors. 859 F.2d at 1191-92. First, petitioners are attempting to recover for themselves assets that the receiver is attempting to marshal for depositors generally. *Id.* Second, in attempting to recover interest that the receivership court has excused Old Court from paying, petitioners would have the federal district court undermine the orders of the state court attempting to achieve a just result for *all* depositors. *Id.*

Precisely because situations arise within our federal system in which the state courts are better equipped than the federal courts to address and resolve the entirety of some controversy, it should not lightly be presumed that Congress intended to hamstring those courts by stripping them of the power to hear federal claims—claims that are easily made (though not so easily proved) and once made (even if unprovable) would disable the state courts from resolving the entire controversy. There is no basis for thinking that Congress meant to give RICO allegations such an effect.

At the time the decision below was rendered, the federal appellate courts and the highest state courts that had considered the issue were unanimous in the view that state courts are competent to hear private RICO claims.[9] Petitioners nevertheless point to what they believe will develop into a significant conflict emanating from a subsequent decision of a divided Sixth Circuit panel in *Chivas Products Ltd. v. Owen*, 864 F.2d 1280. The Sixth Circuit reasoned that, because the language of the section of RICO creating a civil remedy is nearly identical to the section of the Clayton Act creating the private antitrust remedy, and because jurisdiction under the antitrust laws lies exclusively in the federal courts, RICO jurisdiction is also exclusively federal.

However similar RICO's language may be to that of the Clayton Act, such general modeling of one statute after another does not rise to the level of an "unmistakable implication" of an actual congressional intention to divest state courts of jurisdiction. Congress had no such actual intention precisely because, as the Sixth Circuit panel conceded, no one in Congress actually thought about the issue. *Chivas Products*, 864 F.2d at 1283. The kind of fictive intent attributed to Congress by the Sixth Circuit is just what this Court meant to foreclose by its emphasis in *Gulf Offshore* that either explicit statutory direction or an unmistakable implication from the legislative history is required to rebut the presumption of concurrent state jurisdiction.

In short, whatever potential for conflict *Chivas* may have created is likely to prove short-lived. That decision stands alone against the weight of authority, and it is at war with the logic and good sense of concurrent state court jurisdiction. There is good reason to expect that

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[9] *See Brandenburg v. Seidel*, 859 F.2d 1179; *Lou v. Belzberg*, 834 F.2d 730; *Cianci v. Superior Court*, 710 P.2d 375; *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988); *Rice v. Janovich*, 109 Wash. 2d 48, 742 P.2d 1230 (1987). *See also County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985).

the Sixth Circuit will bow to the force of the mainstream view as the weight of authority to the contrary builds against it. A grant of certiorari at this time, in this case, would bring the issue to the Court prematurely.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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